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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-744

MIDLAND INDEPENDENT SCHOOL DISTRICT and
JAMES H. MAILEY, SUPERINTENDENT,

Petitioners,

v.

UNITED STATES OF AMERICA,
DR. VIOLA COLEMAN, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

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James H. Mailey, Superintendent,

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United States of America,
Dr. Viola Coleman, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 28, 1975.

Petitioners are Midland Independent School District and its General Superintendent, James H. Mailey. Petitioners were Defendants in the District Court and Appellees in the Court of Appeals.

Respondent, United States of America, was Plaintiff in the District Court and Appellant in the Court of Appeals. Respondents, Dr. Viola Coleman, Avelino Carrasco, and E. O. McCormick were Intervenors in the District Court and Appellants in the Court of Appeals.

OPINIONS BELOW

The orders and judgments of the District Court are set forth in Appendix "A" and are reported in part in United States v. Midland Independent School District and Dr. James H. Mailey, 334 F. Supp. 147. The opinion-mandate of the Court of Appeals is reported in 519 F.2d 60, a copy of which is set forth in Appendix "B". The Court of Appeals has issued its opinion of August 28, 1975, as and for the mandate. Under these circumstances the Court of Appeals does not enter a separate "judgment". Therefore, such opinion is the "judgment" of the Court of Appeals as well as its opinion-mandate.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1975. This petition for certiorari was filed within 90 days from August 28, 1975. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. When the School District Petitioner has satisfied the United States of America, Plaintiff-Respondent, by complete and total removal of the dual system except as it might apply to less than 2% of the scholastic population, should

the School District be required to go 100% of the way, and in doing so destroy the high quality bilingual programs now existing and eagerly desired by the Mexican-American students?

The record in this case reveals that in 1975 the total scholastic population of the Midland District is 16,327 students; that the two Midland high schools are fully integrated and fed by youngsters of all races and ethnic groups; that the three 7th and 8th grade junior high schools, each occupied by 7th and 8th grade students only, are fully integrated and are fed by youngsters of all races and ethnic groups; that the two freshman schools, occupied by 9th grade students only, are fully integrated and fed by youngsters of all races and ethnic groups; that United States of America, Plaintiff-Respondent herein, has, with the exception of 308 pupils in the De Zavala Elementary School, accepted and approved the most recent plan, Plan A-2, that encompasses all of the elementary schools situated in the District. As stated, the present enrollment of De Zavala contains 308 Mexican-Americans, and the total enrollment of the entire school system is 16,327 students.

From a reading of the Court of Appeal's opinion-mandate, one might think that Petitioners have been derelict in their duty. Not so. Petitioners are proud of the results brought about in desegregating the school system, and it is now time for them to stand up and defend themselves. Here's why.

Since 1968 under the Midland Plan, as modified in 1971 by Plan A-2 (which plan Petitioners are eager to implement, if only permitted to do so), the following results have been obtained as of 1975:

School	Agreed In Compliance (Number of Students)		Disputed (Number of Students)	
HIGH SCHOOLS				
Lee	(x)	2208		
Midland	(x)	1687		
FRESHMAN SCHOOLS				
Austin	(x)	810		
Edison	(x)	691		
JUNIOR HIGH SCHOOLS				
Alamo	(x)	1040		
Goddard	(x)	949		
San Jacinto	(x)	822		
ELEMENTARY SCHOOLS				
Bonham	(x)	400		
Bowie	(x)	498		
Burnet	(x)	462		
Crockett	(x)	467		
Emerson	(x)	458		
Fannin	(x)	484		
Henderson	(x)	495		
Houston	(x)	333		
Jones	(x)	532		
Lamar	(x)	300		
Long	(x)	335		
Milam	(x)	488		
Pease	(x)	488		
Rusk	(x)	408		
South	(x)	455		
Travis	(x)	562		
Washington	(x)	313		
West	(x)	313		
De Zavala			(x)	329
TOTALS		15,998		329

Insofar as the bilingual program is concerned, two witnesses testified in detail as to that program, the first being Gilbert C. Tompson, the then President of the Board of Trustees of the District, and the second being Manuel Carrasco. This testimony was given August 26, 1971, during the trial of this cause before the District Court, and the testimony revealed that approximately 80% of the Mexican-American children come to the first grade level unable to accept instructions in the English language; that this District has been working with several programs in De Zavala, both at the pre-school level and in the early grades in an effort to prepare those children to use the English language, both as a second language and for bilingual instruction; that if the program were diluted over the entire city, this program would be ineffective. The testimony further reveals that for the District to be able to work with them as they are presently doing, in a group, enables the District to give these Mexican-American students a benefit that the District cannot provide in a dispersed situation.

The witness Carrasco who, at the time of this trial had lived in Midland for 27 years, stated that the people in the De Zavala neighborhood have wholeheartedly accepted the bilingual program. They want it, and they want to keep it.

2. Absent any de jure segregation, and once the dual system of education has been eradicated, and in the face of findings to that effect by the District Court, may the Court of Appeals constitutionally demand continued and constant shifting of students, merely to maintain what such Court considers a proper mixture of race and color?

As shown by the record, separate and distinct full-blown hearings were held in the trial of this case, the first commencing on August 24, 1970, the second commencing on the 26th day of August, 1971, and the third commencing on

October 15, 1971. All parties in this cause were permitted by the Trial Judge to present witnesses, documents and exhibits that the parties believed supported their respective positions. Among other things, the District Court found that the School Board acted consistently and in good faith since prior to the Midland plan of 1968 to eliminate all vestiges of the dual system of education; the District was able to integrate staff, facilities and install proper curriculum and special educational programs; that the Midland District did not deliberately resist the Supreme Court's mandate to wipe out the dual system, but, to the contrary, demonstrated a desire to comply with that mandate.

Based upon the foregoing findings, the District Court then ordered the implementation of Plan A-2, the plan that was later stayed by order of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, the Statutory Provisions of 42 U.S.C., Section 1983, and Rule 52(a) of Federal Rules of Civil Procedure are those constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

This case orginated in a suit brought by the United States of America, such suit alleging that Petitioners were operating a dual system based on race. The case was originally brought against the Texas Education Agency and numerous Independent School Districts in Texas, including Midland Independent School District. The Midland case was severed from the original complaint and transferred to

the Midland-Odessa Division of the United States District Court for the Western District of Texas. The case is a school desegregation action brought by the United States of America pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000(c)-6, and the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was envoked under 28 U.S.C. 1345, and 42 U.S.C. 2000(c)-6. (Complaint, Paragraphs 1 and 2). That complaint was defended successfully in the District Court. On appeal, the Court of Appeals for the Fifth Circuit vacated the Trial Court's judgment and instructed the District Court to require the School Board forthwith to constitute and implement a pupil assignment plan that complies with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 91 S.Ct. 1267, 28 L. Ed. 2d 554. Thereafter the District Court did so order the School Board, and, in compliance with such order, the School Board, on the 26th day of August, 1971, presented its Plan A-2. On that same date, the Intervenors-Respondents presented Motion to Intervene, and the District Court eventualy permitted such intervention. Hearing was commenced, and subsequent to such hearing, on October 15, 1971, the District Court heard additional arguments on the plans submitted by the School Board and those submitted by the Intervenors-Respondents. Judgment approving Plan A-2, submitted by the School Board, was entered by the District Court on October 21, 1971. On January 12, 1972, Petitioners filed a motion with the District Court to be permitted to put into effect and implement Plan A-2 described in the Court's Judgment of October 21, 1971. This motion was granted, but Intervenors-Respondents filed motion with the Court of Appeals to stay the implementation of such plan. The Court of Appeals stayed the implementation, and from and after that time, Petitioners have not been able to implement the plan. On

June 30, 1975, more than four years after the implementation of Plan A-2 was first stayed, the Court of Appeals issued order granting the United States of America's motion to supplement the record and for a decision in the case, or to vacate the stay pending the appeal.

On August 28, 1975, the Court of Appeals reversed the Judgment of the District Court and directed that it "should immediately take the necessary steps to completely dismantle the dual system in the elementary grades, . . ." During September of 1975, Midland Independent School District and James H. Mailey, Superintendent, filed their Petition for Rehearing, and for clarification, in the Court of Appeals for the Fifth Circuit, such petition having been denied. This Petition for Writ of Certiorari results.

REASONS FOR GRANTING THE WRIT

1. Contrary to the decisions of this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed.2d 554, 91 S. Ct. 1267, in *Winston-Salem/ Forsyth County Board of Education* v. *Scott*, 404 U.S. 1221, 31 L.Ed.2d 441, 92 S. Ct. 1236, and in *Wilfred Keyes, et al*, v. *School District No. 1*, 413 U.S. 189, 37 L. Ed.2d 548, 93 S. Ct. 2686, the Court of Appeals required Petitioners to cure the ills of resegregation.

The Court of Appeals, in its August 28, 1975, opinion puts great emphasis on the fact that three elementary schools other than De Zavala Elementary and Washington Elementary have "virtually all-minority" enrollments. They are Crockett Elementary, Milam Elementary and Pease Elementary. These three schools were identified expressly in the trial of these proceedings in the District Court and were shown to be schools that were constructed for the anticipated sudden growth in the Midland Independent School District, brought about by the discovery of an oil

field near Midland in the 1950s. The record further reveals that all three of these schools were originally intended to house Anglos, and did for a while. As a result, however, of the decline in the influx of population into the Midland Independent School District, and as a result of overbuilding of residential properties in the neighborhoods in question, many of the residential units were left unoccupied, and a shift in the population of the City of Midland resulted in members of the minorities occupying these homes, or a large part of them. All of this was admitted by the Justice Department through its attorneys during the trials of this cause in the District Court, as shown by the following discourse between the Trial Judge and the Attorney for the United States of America at the opening of the proceedings that commenced October 15, 1971:

> "THE COURT: That is what we are getting down to. Where do you find it violates *Swann* as interpreted by Chief Justice Berger?
>
> "A As a result of our negotiations and discovery work done in the school district we determined that the Pease and Crocket schools were not Constitutionally violative of the fourteenth Amendment. The student structure was a result of residential growth and therefore any segregation that existed in those schools was — it was the conclusion of the government that it was a result of what is termed defacto segregation.
>
> "THE COURT: How did you reach that determination? What is it based on?
>
> "MR. CONROY: The school district had set up school zones for those schools at a time when they were anglo student population schools. Without changing the school zones, without any action, affirmative action on the part of the school district, the nature of the neighborhood changed and the schools went from Anglo schools to heavily predominantly minority groups schools. This is something which the school district

took no part in, it is our judgment, and therefore it was the result of changing residential patterns and we therefore determined those were not ones in which we could seek any remedial relief.

"THE COURT: What is the difference between that and the other two schools

"MR. CONROY: The Washington Elementary —

"THE COURT: — Washington and De Zavala.

"MR. CONROY: We had attempted to make our position on De Zavala clear in our submission —

"THE COURT: — I think it is clear as to De Zavala. That is where the Mexican-American issue is involved?

"MR. CONROY: Yes, sir. The position of the government as to the Washington Elementary School was that it was opened in 1953 at the part of the former state required dual system and as a result of neighborhood zoning since that time the school has never changed its pattern of being an identifiably black minority school. This is the remedial action which we sought from the district, to desegregate that facility as being a vestige of that past dual system and this is where we are today.

"THE COURT: What was it that brought about the Pease change that you found?

"A The Pease school opened as an Anglo school. Now why it changed, it would be my conclusion that as a result of speculation by real estate developers in the area that the city of Midland was going to grow significantly to the Northeast and there was a great deal of housing built in that area which was never occupied, as a result of, apparently, an oil field that never came through and so the housing was built to house the workers that would be in that area which never developed, leaving housing open for other people to move into. As a result of that, minority group indi-

> viduals did move into that area and it changed the complexion of that neighborhood."
>
> (Transcript of proceedings of October 15, 1971, pages 4-6)

Again, page 21 of the Transcript of Proceedings of October 15, 1971, the Attorney for the United States of America, in speaking about the Plan A-2 suggested by Petitioners herein, says:

> "MR. CONROY: Your Honor if I might, if in a school district that were 90 per cent black by population it would be absurd for us to contend that all schools have to have a majority of Anglo students in order to comply with the Court's requirements. However, in a school district in which the overall population is so heavily Anglo, we take that into consideration when responding to a proposal by the school district. Now in the case of this proposal we responded that this proposal in light of the composition of the school district was satisfactory to the Constitutional requirements."

After the Court of Appeals stressed the statistical information recently received, it goes on to say, "The record clearly demonstrates that the Midland School District deliberately segregated Mexican-Americans from Anglos." If this opinion stands uncorrected or unchallanged, then the mandate of the Court of Appeals will be considered as requiring the Petitioners herein to assume a burden never intended to be placed on any school district, and that is to engage itself in a continual, costly and impossible job of combatting resegregation not brought about by any direction of the District, nor brought about by anything that the Midland Independent School District has done, and wherever such resegregation may develop in the system. If the Court below did not intend its mandate to require Petitioners to do so, it should be instructed to clarify its

mandate to include only its directions as to De Zavala Elementary School.

> 2. The Court of Appeals has decided a federal question in conflict with this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267.

Although the Court of Appeals refers to the Swann case, and in 1971 expressly ordered the District Court to implement a pupil assignment plan that complies with the principles established in Swann, there is one principle established in Swann which clearly demonstrates that the dedicated efforts on the part of the School Board in the Midland Independent School District point to compliance, rather than revealing a record that "demonstrates that the Midland School District deliberately segregated Mexican-Americans from Anglos."

What does the record reveal? It reveals that out of 19 elementary schools, 2 freshman schools, 3 junior high schools, and 2 senior high schools, and out of a total of some 18,000 pupils, this litigation commenced in 1968, has produced 25 schools in compliance and only one Mexican-American elementary school, with some 308 students, to which the United States objects. All but the one elementary school, De Zavala, United States of America has accepted as being in full compliance with the Constitution, and in all respects, except for that one school, a fully integrated unitary system. Repeatedly, the United States of America, Plaintiff-Respondent herein, recognized the constitutionality and validity in Plan A-2 insofar as it concerned the black students and the solution regarding their integration (Transcript of Proceedings of October 15, 1971, pages 3, 7, 13, 21 and 23). Plaintiff-Respondent herein even went so far as to file a brief on or about December 10, 1971 (Brief

for the United States Requesting Affirmance of District Court's Ruling insofar as Washington is concerned, pages 3, 18). There the United States says:

> "On July 12, 1971, the District Court ordered the Midland school system to constitute and implement such a plan. Defendants then commenced negotiations with the United States to determine if an agreed upon plan could be formulated. While unable to agree on the District's obligation to desegregate its Mexican-American school — De Zavala Elementary — the parties did agree to the School Board's proposal for desegregating its black school — Washington Elementary."

The Court of Appeals bases its opinion and mandate upon statistical information and upon information contained in a so-called "post hearing submission of the United States" appearing of record in the case having been filed some time during the month of September 1971. Little else that could form the basis of the opinion and mandate can be found in this record. On the final page of the Appendices, made a part of this petition, pupil enrollment for the period from 1912 through 1975, for Midland Independent School District, reveals a total scholastic population in the Midland District of 477 in 1912, and a total for 1975 of 16,342. It also reveals that until 1949 there were never 4,000 students in the system, and that thereafter the District was exposed to sudden and extreme growth, with all of the accompanying problems of rapid expansion. By no stretch of the imagination could this school district that existed after 1954 be called one and the same district that existed in 1912, and yet the Court of Appeals goes back to 1912 when there were 40 or so Mexican-Americans in the system and used Board Minutes of the district some 63 years ago as a basis for its opinion that the Midland district, contrary to what the

records shows, has a deliberate intention to segregate these children.

3. This Court should return this case to the Court of Appeals so that the Court of Appeals may clarify its instructions to the parties and require the United States of America to make its position clear.

Midland Independent School District cannot proceed until the United States of America makes up its mind. In one breath, Plaintiff-Respondent says, Pease, Crockett and Milam Elementary Schools are in compliance; that no dual system exists there; that only De Zavala remains a vestige of the dual system. In the next breath, they indicate that their position is that Washington Elementary, the only school complained about, other than De Zavala, has been corrected, but now, what about Pease, Crockett, Milam and De Zavala?

This record clearly reveals the position of the United States of America who is the Plaintiff-Respondent in this case. Nothing could be clearer than the fact that the United States of America admitted in open court that the only school about which there was any question was De Zavala Elementary School.

Only when these Petitioners are in receipt of clarified instructions, can they continue to make further progress in this troublesome matter. For example, in an earlier mandate by the Court of Appeals, in 1971, the Midland Independent School District was ordered to come up with a new plan, and it did so. This new plan, designated Plan A-2 (Appendix A), attempted to dispose of all objections by the United States of America in the Plan's treatment of De Zavala and Washington Elementary, the only remaining schools about which the United States complained. Plan A-2 did take care of Washington Elementary, and, except

for the high quality bilingual program instituted there, left De Zavala as it was. Intervenors-Respondents then moved for and obtained a stay of the plan because they objected to the way that Washington Elementary was cured. Consequently, Plan A-2 was never given a chance to be put into effect, and that plan seems to be overlooked by the Court below. Had Petitioners been permitted to implement Plan A-2, the Court of Appeals would not have had to write in its recent opinion-mandate, "there is no de jure -- de facto problem as to Washington school. Booker T. Washington Elementary School in 1953 was a negro school as required by the Texas Constitution, Article VII, Section VII. It still has no Anglos, and only 13 Mexican-Americans. It is a vestigial product of de jure segregation." That condition was cured, admittedly, and it was only the Court of Appeals that prevented these Petitioners from ridding itself of that remaining "vestigial product of de jure segregation." That had been accomplished in Plan A-2, a fact apparently completely ignored by the Court below.

4. Contrary to fundamental rules of trial and appellate practice in the federal court system, the Court of Appeals has seen fit to substitute itself for the trier of all contested facts, and in doing so, guilty of grave error that should be corrected (Fed. R. C. Pro. 52(a)).

The Court of Appeals reaches 63 years back to 1912 School Board Minutes that indicated the Board resolved to provide a separate school for Mexicans, if demanded; that the demand was met in 1914; that until the 1940s, three decades ago, the school was a terminal facility; that no student of Mexican ancestry was graduated from Midland Senior High until 1952; that the admission of Mexican-Americans to Junior High was not necessary until 1946. Most all of this testimony comes from a so-called "post hearing submission of the United States" filed by the United

States and made a part of the record. On this contested question of fact as to whether or not the Midland Independent School District had violated constitutional rights of Mexican-Americans in the District, the Court completely ignored the testimony that formed the bases for the District Judge's decision. This was a question upon which reasonable minds can differ, and yet the Court of Appeals apparently abandoned trial and appellate practices and substituted itself for the trial judge in rendering its decision concerning De Zavala Elementary. As the District Court did, the Court of Appeals should have considered the evidence of the witnesses Gilbert Tompson, James H. Mailey, Manual Carrasco, and even that of Plaintiff-Respondent's expert, Dr. Jessie S. Miguel, who testified that his office had developed a desegregation plan for Midland Independent School District in spite of the fact that he admitted he knew of no instance where the School Board had deliberately intended any segregation, and who also testified that he had never lived in Midland, Texas, and that he made one trip to Midland, Texas, nine years prior to the hearing and had not been back since. The plan he presented to the Court, he said, was worked up after listening to a discussion with a meeting between Midland representatives and himself; that the plan was worked out that night and all the next day, taken to the Senior Program Officer in Washingon, D. C., who presented it to an "adhock committee". This adhock committee then looked over the plan and decided which way it would be best for Midland Independent School District to conduct their system (Statement of Facts of August 24, 1970, Vol. I, page 18).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Dated November 20, 1975

PROOF OF SERVICE

I, Thornton Hardie, Jr., one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1975, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the following Counsel for Plaintiff-Respondent and Intervenors-Respondents:

J. Stanley Pottinger
U. S. Department of Justice
Civil Rights Division
Washington, D. C. 20530

Louie M. Stewart
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Attorney General
State of Texas
Austin, Texas 78701

United States Attorney
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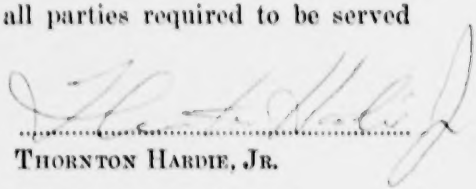
San Antonio, Texas 78206

by mailing same to such Counsel at their respective addresses and depositing the same in a United States mail box in an envelope properly addressed to such addresses with first class postage prepaid.

I further certify that all parties required to be served have been served.



THORNTON HARDIE, JR.

Attorney for Petitioners

APPENDICES

APPENDIX "A"

consisting of the following:

1. Judgment of the District Court entered September 9, 1970.
2. Order of Court of Appeals remanding case to District Court dated June 28, 1971.
3. Judgment of District Court entered October 21, 1971, with copy of Plan A-2 attached.
4. Motion of United States for decision or to vacate stay pending appeal dated June 19, 1975.

A-1

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT and
DR. JAMES H. MAILEY, Superintendent

MO-70-CA-67

Carrying out the wishes of the Fifth Circuit this Court afforded a prompt hearing to the parties in this cause and shortly after said hearing did enter its Judgment finding that the Midland Independent School District was operating a unitary school system within which no person is to be effectively excluded from any school because of race or color (Alexander vs. Holmes County, 396 U.S. 19; 24 L.Ed.2d 21.)

This opinion is to supplement the Judgment as stated would be done in the Judgment.

In June of 1968 the Midland Independent School District adopted a desegregation plan which was adopted by the Board of Trustees on June 8, 1968. This plan put into immediate operation a unitary system bringing about a merger of faculty, staff, students, transportation services, athletic and other extra curricular school activities.

Copy of this plan appears in Defendant's Exhibit A with the supplemental plans adopted for the school year 70-71.

This court finds that the School Board in the initial adoption of the plan in June 1968 acted in complete good

faith and with recognition of its affirmative duty to disestablish the dual system and all its effects. The Court further finds that the School Board by said original plan and supplements thereto is fullfilling its duty to take affirmative steps as spelled out in *United States* v. *Jefferson County*, 372 F.2d. 836 and fortified by *Green* v. *New Kent County*, (1968) 391 U.S. 430 and *Alexander* v. *Holmes County*, 396 U.S. 19 (1969) to find realistic measures that transformed the de jure dual segregated schools into a unitary non racial system of public education.

"There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green* v. *New Kent County*, Supra.

Circuit Judge Goldberg in the case of *Carr* v. *Montgomery County*, No. 29521, dated June 29, 1970, has written the opinion of this Court in the Midland Independent School District case wherein he states:

> "The Plaintiffs contend that this case should be remanded for the adoption of a more effective plan, but their arguments in behalf of this position are decidedly unpersuasive. Their first argument is a rather generalized contention that the district court could have done a better job, and consequently that we should remand to give the court another chance. We are told that some better plan should be adopted to increase the percentage of minority-race students in some of the schools and that the court should have required more pairing of schools. We reject this argument because the plaintiffs are asking us, in effect, to substitute our judgment for that of the district court. The plainiffs are expressing displeasure with certain aspects of the plan, but in our view they cannot point to any basic flaw in the plan's overall effectiveness. On the contrary,

> our examination of the record indicates that the plan adopted by the court below is in accord with the mandates of the Supreme Court and this Court and is a workable, viable plan to disestablish the dual school system in Montgomery County. In these circumstances, the fact that we might have handled some minor details differently had we been considering the matter in the first instance is irrelevant. Though a desegregation order entered by a district court is certainly not graven in stone, we are most reluctant to reject a workable desegregation plan on the basis of arguments directed toward miniscule portions of the overall scheme. The plan submitted by the Board is a feasible plan which disestablishes the dual school system, and we think the district court was correct in granting its approval."

and wherein he further states:

> "As far as the record reveals, nothing with regard to faculty staff, transportation, extracurricular activities, or facilities will indicate that any school in Montgomery County is designed to receive white children or Negro children; on the contrary, each school will be intended to receive "just children." Moreover, with respect to the composition of student bodies the projections under the plan are impressive. There will be no all-white schools. There will be only one all-black school — an elementary school "deep in the heart of a predominantly Negro residential area." Even if this school should remain all-black for the near future, its students will go on to attend junior highs and high schools with students of both races. The Supreme Court has taught us that "(t)he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." Alexander v. Holmes County Board of Education, 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19, 21. The Montgomery County Board of Education has proposed a plan which fulfills that obligation; the district court has ordered the plan implemented; and we approve the district court's order."

Midland Independent School District meets all of the requirements with regard to the majority to minority provisions, and as Judge Goldberg further stated:

> "In deciding this case we are conscious that it is not or us to blueprint every detail and write every specification for the construction of a desegregated school system. That burden is on the school board in the first instance."

and this court finds that the Midland Independent School District has met that burden in a very fine manner.

Again, as stated by Judge Bell in the case of *Mannings* v. *Hillsborough County*, No. 28643 issued May 11, 1970 and approving the workings of the school district "The all Negro student body schools which will be left are the result of neighborhood patterns just as is the case with the numerous all white student body schools." and "As appears from the discussion of high and junior high schools, every elementary student in the system including those left in these 8 schools will attend desegregated junior high and high schools (grades 7-12)."

As appears in the plan of the Midland Independent School District all of the students in the one practically all Negro school and in the one practically all Mexican-American school attend desegregated junior high and high schools. These two schools are clearly the result of neighborhood patterns as positively appears from the record in this case.

In addition, the school board has shown tremendous progress in implementing the special needs of the children in these neighborhoods in curricular implementation to better prepare them for advanced grades in the school system wherein the board has provided for pre-school programs for those having language barriers and many other special implementations as set forth in Defendants' Exhibit F.

And as stated by Circuit Judge Gewin in the case of *Lee* v. *City of Troy Board of Education*, No. 30150 (August 24, 1970):

> "The plaintiffs are expressing displeasure with certain aspects of the plan, but in our view they cannot point to any basic flaw in the plan's overall effectiveness. On the contrary, our examination of the record indicates that the plan adopted by the court below is in accord with the mandates of the Supreme Court and this court and is a workable, viable plan to disestablish the dual school system in Montgomery County. In these circumstances, the fact that we might have handled some minor details differently had we been considering the matter in the first instance is irrelevant. Though a desegregation order entered by a district court is certainly not graven in stone, we are most reluctant to reject a workable desegregation plan on the basis of arguments directed toward miniscule portions of the overall scheme. The plan submitted by the Board is a feasible plan which disestablishes the dual school system, and we think the district court was correct in granting its approval."

and Judge Gewin likewise quotes from the *Carr* opinion as follows:

> "As far as the record reveals, nothing with regard to faculty, staff, transportation, extracurricular activities, or facilities will indicate that any school in Montgomery County is designed to receive white children or Negro children; on the contrary, each school will be intended to receive "just children". Moreover, with respect to the composition of student bodies the projections under the plan are impressive. There will be no all-white schools. There will be only one all-black school — an elementary school "deep in the heart of a predominantly Negro residential area." Even if this school should remain all-black for the near future, its students will go on to attend junior highs and high schools with students of both races."

and Judge Gewin further continues:

> "Again we must state, as we did in Carr, that we cannot assume the role of an architect to furnish blueprints and provide specifications for the construction of every facet of a desegregated, unitary school system. The primary responsibility lies with the Board. When the Board presents a plan to the court, it is the responsibility of the court to determine whether the plan is designed to create and provide a unitary school system. In cases where we have felt that a unitary system did not result from a proposed plan, we have not been hesitant to strike it down or require appropriate modifications. In the case before us we are convinced that the plan as modified and supplemented by the order of the district court fully accomplishes the goal of establishing a unitary school system."

As stated by the Court in the case of *Calhoun* v. *Cook*, No. 29605, July 8, 1970 (Circuit Judges Wisdom, Thornberry and Clark) how many under the plan presently approved would be expected to attend a racially integrated school for one or more full school years during the course of their completion of 12 grades of education in this system.

Under the plan of the Midland Independent School District all children, white, Negro or Mexican-American will attend fully racially integrated school for their last six years. (See opinion of Judge Bell in the case of *Davis* v. *Mobile County*, No. 29332, June 8, 1970).

The plan of the Midland Independent School District is a true neighborhood assignment plan.

There is a member of the Negro race on the School Board. A biracial committee has been functioning and is functioning to keep the unitary system functioning and correcting any defects that might appear. Likewise planned locations are designed to eliminate any possible segregation.

The Court finds that the Midland Independent School District has taken substantive provisions of a definite and affirmative nature which has satisfied the obligation of the Board to terminate the dual school system and that it is implementing the original plan in such a manner as to see that the school district continues to operate as a unitary system so that no person will be effectively excluded from any school in its district because of race or color.

The plaintiff in this case revealed a completely inadequate study of the operation of the Midland Independent School District and of the plan of the school district, and its conclusions are not supported by the facts in this case and it completely failed to submit proof of the allegations on which it sought the relief prayed for.

THEREFORE, Plaintiff's petition for injunction is DENIED and approval of the plan submitted by the Plaintiff is DENIED.

ENTERED THIS 9th day of September, 1970.

/s/ Ernest Guinn
United States District Judge

A true copy of the original, I certify.

By /s/ James Drane
Deputy

Dan W. Benedict, *Clerk*

A-8

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30,799

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(June 28, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

PER CURIAM:

The judgment of the district court as it relates to pupil assignment in the elementary schools of the Midland Independent School District is vacated. The case is remanded with the direction that the district court require the school board forthwith to constitute and implement a pupil assignment plan that complies with the principles established in Swann v. Charlotte-Mecklenburg Board of Education, 1971, U.S. 91 S.Ct. 1267, 28 L.Ed.2d 554.

The district court shall require the school board to file semi-annual reports during the school year similar to those required in United States v. Hinds County School Board, 5 Cir. 1970, 433 F.2d 611, 618-19.

VACATED AND REMANDED WITH DIRECTIONS.

The Clerk is directed to issue the mandate forthwith.

In The

UNITED STATES DISTRICT COURT

For The Western District of Texas

Midland-Odessa Division

United States of America,

v.

Midland Independent School District and
James H. Mailey, Superintendent

No. MO-70-CA-67

In this school case, the judicial power of this Court can be invoked only on a showing of discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education*, 374 U.W. 483 (1954).

"The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." (*Winston-Salem/Forsyth County Board of Education* v. *Catherine Scott, et al.* August 31, 1971, by the Chief Justice).

"We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of

Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination."

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."

"The record in this case reveals the familiar pheomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by by law." *Swann* v. *Charlotte-Macklenburg Board of Education,* 401 U.S. ....., 91 S.Ct. ....., 28 L.Ed. .....

There have been four plans submitted to this Court, two by the School Board of the Midland Independent School District and two by the Intervenors. The Plaintiff in the case, the Department of Health, Education and Welfare, stated that these plans meet the constitutional requirements in so far as they relate to Negro children and the Court agrees with the Plaintiff on this point. Con-

sequently, the decision of this Court is simplified, — which plan should be adopted rests entirely in the hands of the school board since this Court can not and would not take over the administrative functions resting in the discretion of school authorities.

The Defendant School District has stated that it approves the plan referred to as A-2. If it approves this plan and decides to put it into effect it may do so since it does not violate any of the constitutional standards required by the Supreme Court.

A different question is presented with regard to Mexican-American children since the record reveals that there has never been any *de jure* segregation of Mexican-American children, and that there is no evidence showing discrimination violative of the constitutional standards. Consequently, the plan of the Midland Independent School District relating to the De Zavala School is approved. The Plaintiff, Department of Health, Education and Welfare opposes the plan of the School District on this point.

To give the background of this case, the United States acting through its Department of Health, Education and Welfare, filed its complaint on August 7, 1970, in the Austin Division of the Western District of Texas, including as defendants the Texas Education Agency, the Midland Independent School District and six other school districts in the Western District of Texas. Since the Midland Independent School District lies within the Midland-Odessa Division of the Western District of Texas, the case was transferred from Austin to the Midland-Odessa Division and severed from the other defendant school districts which remained in the Austin Division.

Hearings were held in El Paso, Texas, for pendente lite relief for the 1970-71 school year on August 24 and August

25, 1970. Testimony was presented at that time concerning the proposed plan of the United States and a defense by the School District of its proposed plan for the 1970-71 school year.

The United States complaint asserted that the school system was operating a dual system based on race and unless restrained by the Court the school district would continue to maintain and operate a dual system in violation of the constitutional rights of the Negro and Mexican-American children. At the hearings in El Paso on August 24 and 25, 1970, the plan of the Department of Health, Education and Welfare was fully developed and the action of the School Board after Brown I to eliminate the previous existing *de jure* segregation of Negro students was likewise fully developed.

The record from those hearings established that the School Board of the Midland Independent School District worked diligently with the segregation problem in attempting a desegregation plan which the School Board believed eliminated once and for all all vestiges of the dual system of education. The Court finds that the School Board acted consistently in good faith in preparing its plan in June of 1968 to eliminate all vestiges of the dual system of education in the school district. This plan was as follows:

THE MIDLAND PLAN

Two High Schools:

Midland High, fully integrated, is in the center of town and is fed by youngsters of all races and ethnic groups.

Lee High, fully integrated, is in the northwestern part of town and is fed by youngsters of all races and ethnic groups.

Two Freshmen (Ninth Grade) Schools:

Edison Junior High is in the southeastern part of town, is occupied by ninth grade students only, is fully integrated and is fed by youngsters of all races and ethnic groups.

Austin Junior High is in the northwestern part of town, is occupied by ninth grade students only, is fully integrated and is fed by youngsters of all races and ethnic groups.

Three Seventh and Eighth Grade Junior High Schools:

Alamo Junior High is in the western part of town, is occupied by seventh and eighth grade students only, is fully integrated and is fed by youngsters of all races and ethnic groups.

Goddard Junior High is in the northwestern part of town, is occupied by seventh and eighth grade students only, is fully integrated and is fed by youngsters of all races and ethnic groups.

San Jacinto Junior High is in the west-central part of town, is occupied by seventh and eighth grade students only, is fully integrated and is fed by youngsters of all races and ethnic groups.

Nineteen Elementary Schools:

All children of elementary age are assigned to neighborhood schools, each of which and all of which are located within easy-walking distance from the children's homes to which the respective child is assigned. These assignments are made without regard to race and are made strictly on a neighborhood zoning arrangement.

Majority to Minority Provisions:

Appropriate majority to minority provisions have been adopted by the District.

Transportation:

The need for transportation in the Junior High, Freshman and High School levels becomes apparent. Some fifty buses owned and operated by the Midland District transport youngsters without cost to them to school if they reside two miles or more from their assigned building. Transportation is also provided for rural youngsters who request it.

Staff, Facilities, Curriculum and Special Education Programs:

The Midland District, as will be shown herein, has been especially proud of the manner in which it has been able to exceed all requirements regarding integration of staff, provision of facilities for its staff and pupils and installment of curriculum and special education programs that are in the best interest of education for those to whom they are furnished.

The Court further finds that in this plan the School authorities made "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

The Court further finds that the racial concentration of Negroes and of Mexican-Americans in the 1968 Plan was not caused by public or private discrimination or state action but by economical factors and decisions of the Negroes and Mexican-Americans to live in their own neighborhood rather than in predominantly White neighborhoods.

Under the *Swann* decision and related cases, as stated above, judicial power can be invoked only on a showing of discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education, Supra,* and as declared in *Swann* and in *Winston-Salem/Forsyth County Board of Education* v. *Catherine Scott, et al, supra,* on

application to stay order of the Court of Appeals presented to the Chief Justice, "The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

A school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not attributable to school policies or practices and is a result of the housing patterns and other forces over which the school administration had no control. School authorities have the primary responsibility for elucidating, assessing and solving the problems that have arisen from past *de jure* segregation.

The history of the Midland Independent School District does not reveal a deliberate resistance at any time of the Supreme Court's mandate to wipe out the dual system but to the contrary demonstrates desire and attempt to comply with the mandate. This is contrary to the conduct of many school districts which have resisted at every step, during the past 17 years, the Court's mandates to set up a uniform system.

The record of the first hearings revealed complete acceptance by the School District of a unitary system and a desire to eliminate the dual system as promptly and practically as possible.

The government conceded that the original plan of 1968 would meet all requirements except as to one elementary all black school.

At the retrial of this case there were submitted two plans by the School Board relating to Negro children and two plans submitted by the Intervenors relating to Negro children, all of which plans were acceptable to the Department of Health, Education and Welfare.

So far as the Negro children are concerned this acceptance by the Health, Education and Welfare Department eliminates any action by the Court other than approving the plan the Board selects. This Court can only intervene in school matters where there is a showing of discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education, supra.*

This Court on reexamination of the record and of the *Swann* decision and of the opinion of the Chief Justice construing the *Swann* decision, finds that even the Plan of 1968 did not show discrimination violative of the constitutional standards referred to, nor do any of the four plans submitted, in the opinion of the Court violate any of the constitutional standards declared in Brown I.

Consequently, this Court can not take over the administrative functions of the School Board and decide which plan should be used.

"Judicial interposition in the operation of the public school system of the nation raises problems requiring care and restraint."

"By and large public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas,* 21 L.Ed. 228, 393 U.S. 97.

The School Board has stated that Plan A-2 is its choice and if it is the choice of the School Board this Court can not and will not substitute its personal feelings or preferences. Therefore, the Court will approve Plan A-2, which the School Board seeks to have approved, and direct

that same be implemented and put in operation next school term.

In passing however, the Court would state that if the Court were required or permitted by law to perform the administrative function of selecting a plan from equally constitutional plans, the Court would not close either of the Negro elementary schools but would maintain them to carry out the neighborhood concept.

The Court commends the Intervenors for the interest shown and help given in this case and personally feels that these neighborhood schools should be left intact, but the failure of the school board to do this does not present a constitutional question. The Court feels that these neighborhood schools are very important to young children in the elementary grades and that it is not necessary in a unitary system and no good can be accomplished by eliminating the neighborhood school and sending young children long distances from their homes. The Court further feels and finds that the maintenance of these two neighborhood schools would in no wise militate against the unitary system of this school district, nor does the Court feel that additional busing of young children is needed to eliminate *de jure* segregation since there no longer exists *de jure* segregation. However, all of these are matters that the school board has the responsibility of passing upon and its discretion must be respected so long as its conduct in no wise violates the constitutional standards of Brown I.

The only question then actually before this Court in so far as the Department of Health, Education and Welfare is concerned, involves the De Zavala Elementary School. It is the position of the Department that this school is a vestige of a past dual system involving Mexican-Americans. The Court does not accept this nor does the record establish this.

There has never been any *de jure* segregation of Mexican-American children and there has never been a dual system involving Mexican-Americans, and the Court so finds and the Court further finds that there has been no showing of any discrimination violative of the constitutional standards declared in *Brown* v. *Board of Education, supra,* in so far as the Mexican-American children are concerned.

The Court finds from the evidence that the predominance of Mexican-American children in the De Zavala School was not caused by public or private discrimination or state action but by economic factors and the decision of the Mexican-Americans to live in their own neighborhood rather than in predominantly White neighborhoods and that the schoool board has acted consistently in good faith in this matter.

As Texas has never required by law that Mexican-American children be segregated and the Midland Independent School District has never enacted regulations to this effect and from the evidence, the Court finds that there has been no history of discriminatory practices against Mexican-Americans by the school district. "We are concerned in these cases with elimination of discrimination inherent in dual school systems not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation

of schools ultimately will have impact on other forms of discrimination."

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Swann, supra.*

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Midland Independent School District implement its Plan A-2, copy of which is attached hereto and made a part hereof, so that same will be in operation next school term. The Plan submitted by the Defendant for the entire school district including the elementary schools, is hereby approved, being attached hereto and marked Defendants' Exhibit "G" filed in this cause, and this entire Plan shall be fully implemented and in operation by next school term.

It is further ORDERED that the school board of the Midland Independent School District shall file semi-annual reports during the school year similar to those required in *United States* v. *Hinds County School Board,* 5 Cir. 1970, 433 Fed.2d 611, 618-19.

ENTERED THIS THE 21ST DAY OF OCTOBER, 1971.

/s/ ERNEST GUINN
United States District Judge

A true copy of the original, I certify.

DAN W. BENEDICT, *Clerk*

By .....
Deputy

ELEMENTARY SCHOOL BOUNDARY DESCRIPTIONS
PLAN A-2

Bunche Elementary

Begin at the intersection of Fairground Rd. and Indiana Street, west along Indiana to S. Benton, south on S. Benton to Washington Ave., west on Washington to S. Carver, south on S. Carver to Cloverdale Rd., west on Cloverdale Rd., to S. Lamesa Rd., south along the east side of S. Lamesa Rd., and its extension to 120, east on 120 to Fairground Rd., north on Fairground Rd. to E. Indiana.

Rural buses 4, 5, 6 and 9 serving that portion of Midland County east of State Highway 349 are re-routed from Travis to Bunche Elementary.

Travis Elementary

Begin at the intersection of S. Carver and E. Indiana, west on Indiana to the alley between S. Dallas and S. Terrell, south along that alley to its intersection with Griffin Avenue, west on Griffin to State Highway 349, south on Hwy. 349 to 120, east on 120 to the extension of S. Lamesa Rd., north along the east side of the extension of S. Lamesa Rd. and Lamesa Rd. to its intersection with Cloverdale Rd., east on Cloverdale to S. Carver and North on S. Carver to E. Indiana.

South Elementary

Begin at the intersection of Fairground Rd. and E. Hwy. 80, west on E. Hwy. 80 to Cotton Flat Rd., south on Cotton Flat Rd. to 120, east on 120 to State Highway 349, north on Hwy. 349 to Griffin Avenue, east on Griffin to the alley between S. Terrell and S. Dallas, north along that alley to E. Indiana, east on Indiana to S. Carver, south on Carver to Washington Avenue, east on Washington to S. Benton, north on Benton to Indiana, east on Indiana to Fairground Rd., north on Fairground to E. Hwy. 80.

PLAN A-2

Revised Projections

Bunche Open with Rural Buses 4, 5, 6 and 9
Washington Closed

	K (½ day)	1	2	3	4	5	6	SpEd	Total
BUNCHE									
Anglo	9	20	26	27	25	23	23		153
Mexican	5	4	6	2	7	6	4	4	38
Negro	17	21	22	17	22	23	21	7	150
Total	31	45	54	46	54	52	48	11	341
TRAVIS									
Anglo	8	19	24	26	25	22	21		145
Mexican	26	22	35	28	34	28	21		194
Negro	14	17	18	14	19	19	16		117
Total	48	58	77	68	78	69	58		456
SOUTH									
Anglo	13	24	33	37	31	28	31		197
Mexican	21	18	30	23	27	24	17		160
Negro	16	23	25	20	25	24	23		156
Total	50	65	88	80	83	76	71		513

A-22

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-3271

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

DR. VIOLA COLEMAN, ET AL.,

Intervenors-Appellants,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF UNITED STATES FOR DECISION OR TO VACATE STAY PENDING APPEAL

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Washington, D.C. 20530

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3271

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

DR. VIOLA COLEMAN, ET AL.,
Intervenors-Appellants,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION OF UNITED STATES FOR DECISION OR TO VACATE STAY PENDING APPEAL

The United States, plaintiff-appellant herein, respectfully moves this Court to enter an order deciding the questions presented by this appeal in sufficient time to allow for preparation and implementation during the upcoming 1975-76 school term of such desegregation relief as may be forthcoming. In addition, or alternatively, we would request this Court to vacate the order entered by it on June 12, 1972 staying implementation of plans to desegregate the Washington School pending disposition of this appeal. The following discussion of the history and present status of the case is offered in support of this motion.

1. The procedural history of the case is delineated on pp. 2-4 of our original brief filed on December 10, 1971. In short, this Court in June 1971 remanded this case "* * * with the direction that the district court require the school board *forthwith* to constitute and implement a pupil assignment plan that complies with the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Education.*" 443 F.2d 1180. (emphasis in original). On remand the district court (the late Guinn, J.) ordered implementation of a proposal for the desegregation of virtually all-black Washington Elementary which had been agreed to by the United States and the school board. At the same time the district court reiterated its prior opinion (which had been reversed by this Court's decision quoted above) that the operation of the Midland system under a 1968 student assignment plan fully met constitutional requirements. The United States filed notice of appeal on November 5, 1971 and in its brief urged reversal of the conclusions that neither Washington nor DeZavala Elementary (a virtually all Mexican-American school) remain as vestiges of the previously dual school system; and affirmance of the plan approved for Washington.[1] Intervenors-Appellants (Dr. Viola Coleman, et al.) filed a brief challenging the Washington plan on the grounds that it improperly placed the greatest burden of desegregation on black students. The school board's brief defended the legality and educational soundness of the Washington plan as well as the district court's opinion that no unlawful segregation of Mexican-American students existed.

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[1] Although we did not object to the results insofar as Washington was concerned we felt that reversal of the lower court's reasoning was necessary in order to clear the record of any doubts about the efficacy of its order since "[j]udicial powers may be exercised only on the basis of a constitutional violation." *Swann* v. *Board of Education,* 402 U.S. at 16. Brief for the United States, p. 18.

With the filing of the appellee board's brief on December 17, 1971, this case was taken under submission.[2] On June 12, 1972, this Court granted intervenors' petition for a stay pending appeal of implementation of the Washington plan. The stay remains in effect to this date. No steps have been implemented to comply with the Court's June 1971 order, an apparent contradiction with the general rule that "absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated." *Jefferson Parish School Board* v. *Dandridge*, 404 U.S. 1219, 1220 (1971) (Marshall, J., in chambers); see also *Keyes* v. *Denver School District*, 396 U.S. 1215 (1969) (Brennan, J., in chambers); *Winston-Salem/Forsyth County Board of Education* v. *Scott*, 404 U.S. 1221 (1971) (Burger, C.J., in chambers); *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1217-1219 (C.A. 5, 1969), (*en banc*), reversed in part, *sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290.

2. Our appellants brief fully outlines the facts and law establishing that Washington and DeZavala are, respectively, products of a dual system historically imposed on blacks and Mexican-Americans. During the 1974-75 school year enrollments at these two schools were as follows:[3]

---

[2] Apparently since the case was subject to this circuit's procedural rules designed to expedite appeals in school desegregation cases, no oral argument was scheduled. If the court concludes that the scheduling of an oral argument or, of a conference pursuant to Rule 33, F.R.C.P., or the entry of an order directing the parties to address specific questions might serve to promote the disposition of the appeal, we would respond promptly to any such directions in light of the imminence of the 1975-76 school year.

[3] Simultaneously with the submission of this motion, the United States filed a motion to supplement the record on appeal with the latest enrollment statistics in the Midland district. The enrollment data contained in the present motion are taken from the record as supplemented.

	Black	Spanish Surnamed	Anglo	Total
Washington	299	13	0	312
DeZavala	31	308	5	344

The 1974-75 enrollment statistics also reflect that three other elementary schools operated by the Midland system have virtually all-minority enrollments:

School	Black	Spanish Surnamed	Anglo	% Minority[4]
Crockett	167	293	12	97
Milam	187	224	31	92
Pease	388	78	10	97

Should this Court rule that Washington and DeZavala are unlawfully segregated, as requested, the case of *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) would, in light of that ruling, present questions with respect to present operations of these latter three schools.[5] However, since the United States in 1971 neither represented that assignment to those schools was other than lawful nor requested the district court to order relief affecting them,[6] the defendants have never been required to justify the continued one-race character of those schools under the appropriate burden of proof. Such questions might appropriately be presented to the district court in the first instance. Therefore, assuming DeZavala is found to be *de jure* segregated,

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[4] The percentage of minority students (combined blacks and Mexican-Americans) at these three schools during the 1971-72 school year was projected as: Crockett (97%), Milam (81%), and Pease (99%). Defendants' Exhibit G, p. 8.

[5] Most significantly, *Keyes* holds that (a) a segregated school should be defined as one containing an overwhelmingly Mexican-American and/or black student body, 413 U.S. at 198, and (b) a finding of intentionally segregative actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious. *Id.* at 208.

[6] See Brief for the United States, p. 16; Transcript of Proceedings, Oct. 15, 1971, pp. 4-5.

the case should be remanded to the district court for consideration of the effect of *Keyes* on the present operation of the above three schools.

3. A vacation of this Court's stay would activate the district court's order

> "* * * that the Midland Independent School District implement its Plan A-2, a copy of which is attached hereto and made a part hereof, so that same will be in operation next school term."

Slip Op., p. 10. There is no indication in the record that this plan for desegregating the Washington school has been rendered obsolete by the passage of time. The plan is described and its propriety defended by the United States in its brief and in its Response to Motion to Stay Proceedings, served on June 14, 1972. Essentially, under Plan A-2 the Washington school would be closed, a nearby formerly black school, Bunch (constructed in 1959) reopened, and rezoned with two adjacent elementary schools, Travis and South, producing a substantially similar percentage of minority race students in each of the three schools. Together, the three schools would continue to serve the same area south of the Texas and Pacific Railroad tracks as before. The combined elementary enrollment in that area was projected in 1971 to be 1310, 62% of which belonged to minority racial groups.[7] During the 1974-75 school year, 1325 students attended Washington, Travis and South and the combined minority percentage was 64%. If reasons exist indicating that modifications in this plan are necessary or

[7] A copy of Plan A-2, including enrollment projections, was attached to the district court's opinion of October 21, 1971. The school board also projected that the plan would require no new transportation, although some existing transportation would be rerouted. Brief for Appellees in Reply to Briefs of Plaintiff-Appellant and Intervenors-Appellants, p. 10.

desirable, an appropriate motion to that effect could be filed with the district court following vacation of the stay by this Court.

CONCLUSION

The United States urges that this Court promptly decide this appeal and/or vacate the stay of orders to desegregate Washington Elementary School.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served by United States mail, postage prepaid, copies of the foregoing MOTION of United States for Decision or to Vacate Stay Pending Appeal upon the following counsel of record at the addresses indicated:

Thornton Hardie, Jr., Esquire
Turkin, Smith, Dyer, Hardie & Harman
First National Bank Building
Midland, Texas 79701

Garland Casebier, Esquire
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Midland, Texas 79701

Attorney General
State of Texas
Supreme Court Building
Austin, Texas 78701

This 19th day of June, 1972.

/s/ William C. Graves
William C. Graves
Attorney
Department of Justice
Washington, D.C. 20530

APPENDIX "B"

consisting of the following:

1. Order of Court of Appeals filed June 30, 1975, granting motion for decision or to vacate stay.
2. Opinion-mandate of Court of Appeals dated August 28, 1975.
3. Pupil enrollment graph of Midland Independent School District covering the period from 1912 through 1975.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3271

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

DR. VIOLA COLEMAN, ET AL.,

Intervenors-Appellants,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT
and JAMES H. MAILEY, Superintendent,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to supplement the record on appeal is GRANTED.

IT IS FURTHER ORDERED that appellant's motion for decision or to vacate stay pending appeal is GRANTED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3271

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

DR. VIOLA COLEMAN, ET AL.,
Intervenors-Appellants,

v.

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(August 28, 1975)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge:

In this school desegregation case the United States filed its complaint August 7, 1970. The complaint alleged that the Midland Independent School District (MISD) was maintaining separate schools for black and Mexican-American students at the elementary school level.

On September 1, 1970, the trial judge (the late Judge Guinn) found the Midland system to be operating in a unitary fashion, and denied all relief to the United States. On June 28, 1971, this Court vacated the judgment of the

district court as it related to pupil assignment in the elementary schools and remanded "with the direction that the district court require the school board *forthwith* to constitute and implement a pupil assignment plan that complies with the principles established in Swann v. Charlotte-Mecklenburg Board of Education." United States v. Midland Independent School District, 5 Cir. 1971, 443 F.2d 1180.

On remand the district court held that the MISD had never segregated Mexican-American students and denied relief at the one virtually all Mexican-American school in question, the De Zavala Elementary School. The district court also held that the existing plan (which was the subject of the previous appeal) was constitutionally sufficient. Nonetheless the court closed the virtually all-black Washington School. We reversed the judgment of the district court and remand the case with directions.

The Midland Independent School District is a county-wide school system encompassing the City of Midland and the adjacent rural areas. In 1971-72 the total student population was approximately 17,500. Of the 8576 elementary students in the system 14 percent are Negro and 16 percent are Mexican-American. The minority group community is located within the city, east of Big Spring Street, and north and south to the city limits.

The district operates 19 elementary schools, and of these, 7 are east of Big Spring Street. In 1971-72 these 7 elementary schools had an average minority group enrollment of 81 percent. About 99 percent of all black elementary students and 86 percent of all Mexican-American elementary students attend these 7 schools. West of Big Spring Street, in the school district's remaining 12 elementary schools, the student population averages about 96 percent

Anglo in each school. About 90 percent of all Anglo elementary students attend these 12 schools.

A supplemental record was filed July 2, 1975, containing school enrollment statistics for 1972-73, 1973-74, and 1974-75 showing the number of students, by race, in each school operated by the Midland Independent School District.

The figures speak for themselves. Figures for the 1970-71 school year show:

	Black	Mexican-Americans	White	Total
Washington School	434	6	0	440
De Zavala School	43	368	8	419

Figures for the 1974-75 school year show:

Washington School	299	13	0	312
De Zavala School	31	308	5	344

The 1974-75 enrollment statistics also reflect that three other elementary schools operated by the Midland system have virtually all-minority enrollments:

School	Black	Spanish Surnamed	Anglo	Minority Percentage 1971-72	Minority Percentage 1974-75
Crockett	167	293	12	97	97
Milam	187	224	31	81	92
Pease	388	78	10	99	97

The record clearly demonstrates that the Midland School District deliberately segregated Mexican-Americans from Anglos. In 1912 the school board resolved to "provide (a) separate school for Mexicans if demanded", and instructed the superintendent to "make preliminary negotiations with representatives of Mexicans". The "demand" in the Mexican community was met in 1914 when "(t)he board decided to offer the Mexican children a school and a teacher to themselves, and the president was instructed to give official

notice to the Catholic Priest to this effect". This school operated for grades 1-8 until the mid 1940's and was until that time a terminal facility, beyond which Mexican-American students could not proceed. No student of Mexican ancestry (Spanish surname) graduated from the Midland senior high schools until 1952. The admission of Mexican-Americans to the junior high school, which was not necessary so long as the Mexican school served grades 1-8, was not approved until 1946.

The Mexican school, which came to be known as the Latin-American school, and subsequently De Zavala School has historically been an all Mexican-American facility. Mexican-American students were bused into the school; Anglo students living near the school attended school elsewhere.

Elementary school zones were first used in 1946. The zones then did not include the Negro or Mexican-American schools, but placed black students attending the Carver School in the South Elementary School zone, and placed Mexican-American students attending the De Zavala School in the North Elementary School Zone. Both North and South Elementary Schools were at the time exclusively Anglo facilities. De Zavala did not have a student attendance zone until 1956, the same year the Booker T. Washington Elementary School was zoned, under the school board's resolution to desegregate. The neighborhood zone as then drawn exactly circumscribed El Barrio or Mexican Town. De Zavala has been expanded by the defendants to meet the growing Mexican-American population in the area before and after the drawing of the attendance zone.

This zone was supplemented by a transfer policy which allowed a student to attend the schools "in which his racial group predominate(d)". Anglo students living in the De

Zavala zone took advantage of this policy to transfer to elementary schools more distant. In 1968 the school board determined that transfers would henceforth be made "without regard to race or national origin" but by that time the policy had become too established to be affected by this resolution of the board. In 1974-75 there were only 5 Anglos in a total student body of 344.

Morales v. *Shannon*, 5 Cir. 1975, F.2d (No. 73-3096, July 23, 1975) is similar on the facts to the case now before us. In that case too there had been, historically a "Mexican School" in the Uvalde system. Later there were two elementary schools populated by Mexican-American students. In 1954 the Robb school was constructed in the Mexican-American neighborhood and in 1966 the Anthon school was constructed to replace one of the two old Mexican-American elementary schools. Judge Bell, speaking for the Court, pointed out: "The imposition of the neighborhood assignment system froze the Mexican-students into the Robb and Anthon schools. There could have been no other result and this is strong evidence of segregatory intent. This evidence becomes overwhelming when considered in tandem with the additional fact that the school board used the freedom of choice assignment." The totality of facts in this case along with the historical recognition of De Zavala as the Mexican-American school equally demonstrated the segregatory intent of the MISD.

In another recent case, involving the Dallas School system, the Court, through Judge Simpson, recognized that the Dallas Independent School District had a "history of practicing *de jure* discrimination against Mexican-Americans" by isolat(ing) the Mexican-American students in DISD from white students and the DISD's practice of 'integrating' its Mexican-American students with black students".

Tasby v. *Estes*, 5 Cir. 1975, F.2d (72-1381, July 23, 1975). The Court cited two en banc decisions of this Court for the holding that "at least in the State of Texas, segregation of Mexican-Americans in the public school constitutes a deprivation of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution".[1] *United States* v. *Texas Education Agency, Austin Independent School District*, 5 Cir. 1972, 467 F.2d 848, (motion for clarification denied 1973, 470 F.2d 1001); *Cisneros* v. *Corpus Christi Independent School District*, 5 Cir. 1972, 467 F.2d 142, cert. denied 1973, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041, reh. denied 1973, 414 U.S. 881, 94 S.Ct. 31, 38 L.Ed.2d 129.

These two cases were decided before the Supreme Court rendered its decision in *Keyes* v. *School District No. 1, Denver Colorado*, 1973, 413 U.S. 189, 98 S.Ct. 2686, 37 L.Ed.2d 548. The language in our opinions in the Austin and Corpus Christi cases defining *de jure* segregation, absent segregation by statute, is broader than the language employed by the Supreme Court in its analysis of de jure — de facto segregation. Justice Brennan, for the majority, said:

> We emphasize that the differentiation between de jure segregation and so-called de facto segregation to which we referred to in *Swann* is purpose or intent to segregate.

413 U.S. at 208. The facts in the Austin and Corpus Christi cases, however, as in this case, show an overriding intent

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[1] See also, Conment, De Jure Segregation of Chicanos in Texas Schools, 7 Harv. Civ. Rts — Civ. Lib. Rev. 307 (1972); U.S. Comm. on Civil Rights, Ethnic Isolation of Mexican-American in the Public Schools of the Southwest (1971); Comment, Mexican-Americans and the Desegregation of Schools in the Southwest, 8 Hous. L.Rev. 929 (1971).

by the school boards in those districts to isolate, to segregate, Mexican-Americans and blacks.[2]

There is no de jure — de facto problems as to Washington School. Booker T. Washington Elementary School in 1953 was a Negro school as required by the Texas Constitution, Art. VII, Sec. VII. It still has no Anglos and only 13 Mexican-Americans. It is a vestigial product of de jure segregation.

The judgment of the district court approving the desegregation plan for elementary schools in the Midland Independent School District is reversed. The district court should immediately take the necessary steps to completely dismantle the dual system in the elementary grades, in the light of recent decisions of this Court, particularly those referred to in this opinion.

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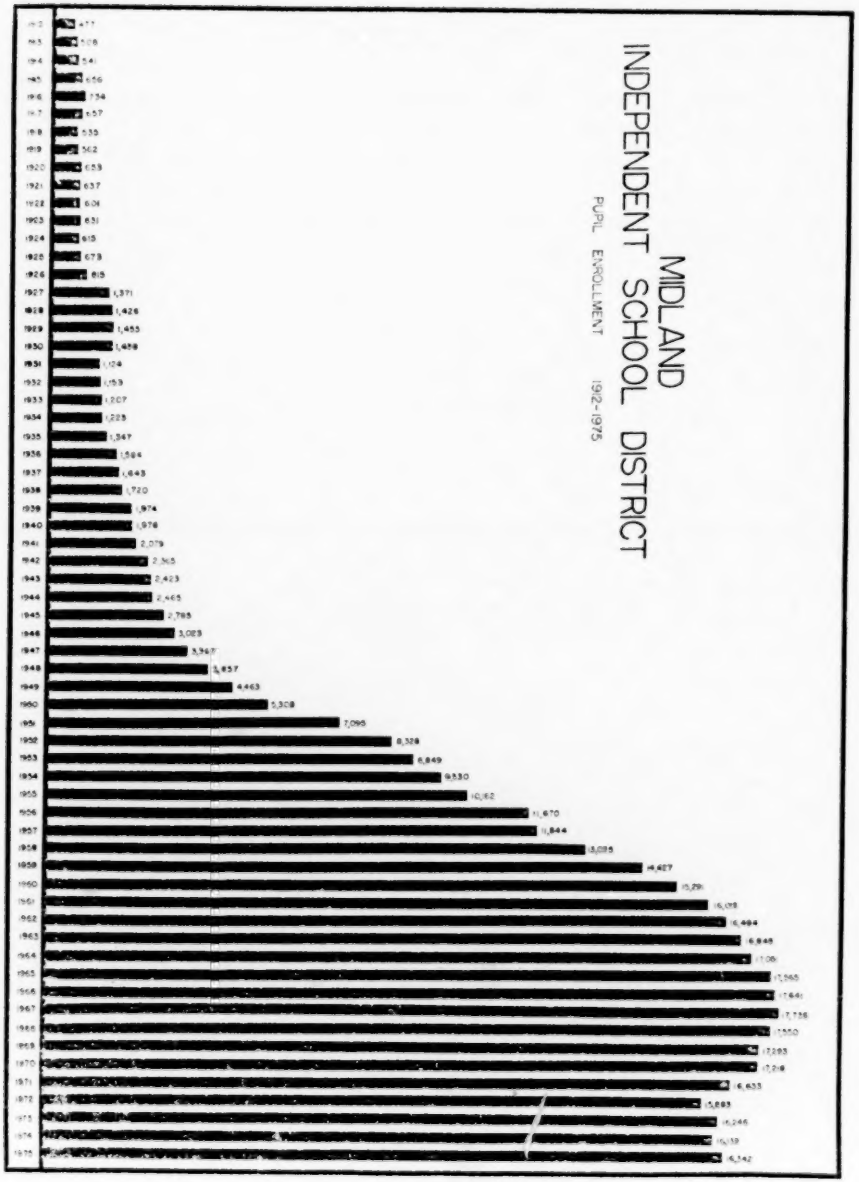
[2] In Keyes the Supreme Court used the following phrases: "deliberate racial segregation" "systematic program of segregation" "obvious . . . effect" "conscious knowledge" "clear effect" "racially inspired school board actions" and "purposefully segregated policies". See also Morales v. Shannon, 5 Cir. 1975, F.2d , in which the Court found a "segregatory intent" from the imposition of the neighborhood assignment school. This Court has said that segregation is unlawful when the school district knew the "nature and foreseeable consequences" of its acts. United States v. Texas Education Agency, 5 Cir. 1972, 467 F.2d 848, 863.


MIDLAND
INDEPENDENT SCHOOL DISTRICT
PUPIL ENROLLMENT 1912-1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-744

MIDLAND INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet App. A-32 to A-38) is reported at 519 F.2d 60. The opinion of the district court (Pet. App. A-9 to A-21) is reported at 334 F. Supp. 147.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-38) was entered on August 28, 1975. A petition for rehearing was denied on November 3, 1975. The petition for a writ of certiorari was filed on November 20, 1975. The jurisidiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly ruled that the evidence demonstrated that De Zavala elementary school was unconstitutionally segregated.

2. Whether the court of appeals properly instructed the district court to take the steps necessary to eliminate the vestiges of the dual school system in the elementary grades.

STATEMENT

The United States instituted this school desegregation suit on August 7, 1970, in the United States District Court for the Western District of Texas alleging that the Midland Independent School District unconstitutionally segregated black and Mexican-American students in the elementary grades. The district court ruled that the school district was a unitary system, and it denied injunctive relief (Pet. App. A-1 to A-7). In June 1971, the court of appeals vacated the judgment of the district court as it related to pupil assignment in the elementary schools, and remanded the case with instructions that the district court require the school board to implement a pupil assignment plan consistent with this Court's ruling in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (Pet. App. A-8).

On remand the district court reiterated its prior opinion that the Midland elementary grade student assignment system met constitutional standards (*id.* at A-16), but it ordered implementation of a school board proposal (which had been agreed to by the school board and the United States) for the desegregation of nearly all-black Washington Elementary (*id.* at A-19). The court also ruled that De Zavala Elementary, a nearly all-Mexican-American school, was not unconstitutionally segregated;

it therefore denied relief as to that school (*id.* at A-17 to A-19).

The court of appeals reversed. It held that both Washington and De Zavala Elementary schools had virtually all-minority enrollments as the result of deliberate segregatory acts on the part of the school board (*id.* at A-34 to A-38), and it ordered the district court to "immediately take the necessary steps to completely dismantle the dual system in the elementary grades, in the light of recent decisions of this Court" (*id.* at A-38).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. Petitioners contend that the court of appeals erred in ruling that the Midland Independent School District deliberately segregated Mexican-American students. The district court found that "the predominance of Mexican-American children in the De Zavala School was not caused by public or private discrimination or state action but by economic factors and the decision of the Mexican-Americans to live in their own neighborhood rather than in predominantly White neighborhoods and that the school board has acted consistently in good faith in this matter" (Pet. App. A-18).

These conclusory findings were contrary to the uncontroverted evidence, which, as the court of appeals correctly ruled, established that the segregation of Mexican-American students at De Zavala was the direct result of deliberate segregatory action by the school board. In 1914 the school board established a terminal elementary school for Mexican-American children (originally called the Mexican school, later the Latin-American school, and most recently De Zavala) (*id.* at A-34 to A-35).

Until the mid-1940's, Mexican-American students were not allowed to attend Midland high schools (*id.* at A-35). Mexican-American students were bused to the Mexican school, and Anglo students living near the school attended schools elsewhere (*ibid.*). When De Zavala was zoned in 1946, the neighborhood zone "exactly circumscribed" the area of Midland in which Mexican-Americans lived, and subsequent zone changes were made as the boundaries of "El Barrio" expanded (*ibid.*).

In addition, until 1968 the school board maintained a student transfer policy that allowed a student to attend the schools " 'in which his racial group predominate(d)' " (*id.* at A-35 to A-36). The results at De Zavala were predictable. In 1970-1971, 368 Mexican-Americans, 43 blacks, and 8 whites attended De Zavala (*id.* at A-34). In 1974-1975, 308 Mexican-Americans, 31 blacks, and 5 whites were in attendance (*ibid.*).

Segregation of Mexican-American students was never mandated by law in Texas.[1] Therefore, the applicable standard for determining whether De Zavala is unconstitutionally segregated is whether the segregation is the result of intentionally segregative actions by school officials. *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189, 198. On this record, as outlined above, the court of appeals correctly concluded that "[t]he totality of facts in this case along with the historical recognition of De Zavala as the Mexican-American School * * * demonstrated the segregatory intent of the MISD" (Pet. App. A-36).

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[1]The Texas Constitution required segregation of black students. Texas Constitution, Art. VII, Sec. VII.

2. Petitioners argue that the opinion of the court below requires them to engage in the "costly and impossible job of combating resegregation not brought about by any direction of the District" (Pet. 11). We do not read the court's decision as requiring such steps. The court ruled that the virtually all-minority enrollments at De Zavala and Washington elementary schools were the result of intentional segregation (Pet. App. A-34, A-38), and it remanded the case with instructions to "immediately * * * dismantle the dual system in the elementary grades" (*id.* at A-38). Nothing in the court's opinion or judgment requires the school board to correct racial imbalance where that imbalance is not the result of intentional segregation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1976.